

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts


The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.17, relating to the award of highway improvement contracts, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §9.17 are adopted and are authorized for filing with the Office of Secretary of State.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:


Director, Construction Division

Recommended by:


Interim Executive Director

113860 FEB 27 14

Minute
Number

Date
Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts amendments to §9.17, Award of Contract, concerning Highway Improvement Contracts. The amendments to §9.17 are adopted without changes to the proposed text as published in the December 6, 2013 issue of the *Texas Register* (38 TexReg 8814) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bills 1050 and 3648, Acts of the 83rd Legislature, Regular Session, 2013, made changes to Government Code, Chapter 2252, Subchapter A, Nonresident Bidders. In addition, House Bill 3648 added a section to Transportation Code, Chapter 223, Subchapter A, Competitive Bids. The rules of the department need to be revised to explain how the award of contracts will be affected by these changes.

Amendments to §9.17, add the new statutory requirements made by H.B. 1050 and H.B. 3648. Under current rules, if a nonresident bidder's principal place of business is located in a state that gives a bidding preference to its in-state contractors, the commission imposes the same preference against that bidder. The amendments to §9.17(c) extend that requirement to a state in which the nonresident bidder is a resident manufacturer, as required by Section 2 of H.B. 1050, and to a state in which a

majority of the manufacturing related to the contract will be performed, as required by Section 2 of H.B. 3648.

Federal law does not allow the use of bidding preferences if federal funding is used, so the preference will not be applied if any federal funds are used. To implement these changes, after bids are publically opened and read aloud, each contract without federal funding will be analyzed to determine if the low bidder is a nonresident bidder. If the bidder is a nonresident, the department will check to determine whether the bidder has a relationship to a state described by amended §9.17(c) that has a bidding preference. If there are no preferences in that state, the nonresident will be awarded the contract. If there are preferences in that state, those same preferences will be imposed against the nonresident bidder. The imposition of those preferences could result in the nonresident bidder not being declared the low bidder depending on the specifics of the preferences.

The amendments also add a new subsection (e) to address the requirements of Transportation Code, §223.050, which was added by H.B. 3648. Under that section, the department, in awarding a contract that has no federal funding, is required to give preference to a private sector provider if the preference creates a positive economic impact on job growth and job

1 retention in this state and the amount of the provider's bid
2 does not exceed an amount equal to 105 percent of the lowest
3 received bid. That requirement is added in the first sentence
4 of subsection (e). The department has determined that a
5 bidder's having its home office in this state serves to create a
6 positive economic impact on job growth and job retention in this
7 state. However, Transportation Code, §223.050, prohibits the
8 use of a preference under that section for a contract award if,
9 without use of the preference, the contract would have been
10 awarded to a contractor whose principal place of business is in
11 a bordering state that does not give a preference to private
12 sector contractors that is similar to the preference provided
13 under Transportation Code, §223.050. Both the determination
14 concerning positive economic impact and the prohibition relating
15 to bordering states are captured in the definition of "preferred
16 bidder" that is applicable to subsection (e).

17
18 To implement subsection (e), the department will determine for
19 each of the bordering states, Arkansas, Louisiana, New Mexico,
20 and Oklahoma, whether it gives a preference to private sector
21 providers in a manner similar to that provided under
22 Transportation Code, §223.050. After bids for a contract that
23 will use no federal funds are publically opened and read aloud,
24 each will be analyzed to determine if the lowest bidder's
25 principal place of business is in either Texas or a bordering

state that does not give a preference similar to Transportation Code, §223.050. If so, the contract will be awarded to the lowest bidder. If not, the contract will be awarded to the lowest bidder only if the bid of lowest bidder whose principal place of business is in Texas or a bordering state that does not give a preference similar to that of Transportation Code, §223.050, is not more than 105 percent of the bid from the lowest bidder.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Government Code, §2252.002; Transportation Code, §223.050.

SUBCHAPTER B. Highway Improvement Contracts

§9.17. Award of Contract.

(a) The commission may reject any and all bids opened, read, and tabulated under §9.15 and §9.16 of this subchapter (relating to Acceptance, Rejection, and Reading of Bids and Tabulation of Bids, respectively). It will reject all bids if:

(1) there is reason to believe collusion may have existed among the bidders;

(2) the lowest bid is determined to be both mathematically and materially unbalanced;

(3) the lowest bid is higher than the department's estimate and the commission determines that re-advertising the project for bids may result in a significantly lower low bid;

(4) the lowest bid is higher than the department's estimate and the commission determines that the work should be done by department forces; or

(5) the lowest bid is determined to contain a bid error that meets the notification requirements contained in §9.16(e)(1) of this subchapter and satisfies the criteria contained in §9.16(e)(2) of this subchapter.

(b) Except as provided in subsection [~~subsections~~] (c), (d), [~~e~~] (e), or (f) of this section, if the commission does not reject all bids, it will award the contract to the lowest bidder.

(c) In accordance with Government Code, Chapter 2252,

Subchapter A, the commission will not award a contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the greater of:

(1) the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which:

(A) the nonresident's principal place of business is located; or

(B) the nonresident is a resident manufacturer; or
(2) the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which a majority of the manufacturing related to the contract will be performed.

(d) For a maintenance contract for a building or a segment of the state highway system involving a bid amount of less than \$300,000, if the lowest bidder withdraws its bid after bid opening, the executive director may recommend to the commission that the contract be awarded to the second lowest bidder.

(1) For purposes of this subsection, the term "withdrawal" includes written withdrawal of a bid after bid opening, failure to provide the required insurance or bonds, or failure to execute the contract.

(2) The executive director may recommend award of the contract to the second lowest bidder if he or she, in writing,

determines that the second lowest bidder is willing to perform the work at the unit bid prices of the lowest bidder; and

(A) the unit bid prices of the lowest bidder are reasonable, and delaying award of the contract may result in significantly higher unit bid prices;

(B) there is a specific need to expedite completion of the project to protect the health or safety of the traveling public; or

(C) delaying award of the contract would jeopardize the structural integrity of the highway system.

(3) The commission may accept the withdrawal of the lowest bid after bid opening if it concurs with the executive director's determinations.

(4) If the commission awards a contract to the second lowest bidder and the department successfully enters into a contract with the second lowest bidder, the department will return the lowest bidder's bid guaranty upon execution of that contract. The lowest bidder may be considered in default and will be subject to debarment under §9.101 [~~§9.100~~], et seq. of this chapter.

(e) If the lowest bidder is not a preferred bidder and the contract will not use federal funds, the department, in accordance with Transportation Code, Chapter 223, Subchapter B, will award the contract to the lowest-bidding preferred bidder if that bidder's bid does not exceed the amount equal to 105

1 percent of the lowest bid. For purposes of this subsection,
2 "preferred bidder" means a bidder whose principal place of
3 business is in this state or a state that borders this state and
4 that does not give a preference similar to Transportation Code,
5 §223.050.

6 (f) [~~(e)~~] When additional information is required to make a
7 final decision, the commission may defer the award or rejection
8 of the contract until the next regularly scheduled commission
9 meeting.

10 (g) [~~(f)~~] Contracts with an engineer's estimate of less
11 than \$300,000 may be awarded or rejected by the executive
12 director under the same conditions and limitations as provided
13 in subsections (a)-(c) of this section.

14 (h) [~~(g)~~] The commission may rescind the award of any
15 contract prior to contract execution upon a determination that
16 it is in the best interest of the state. In such an instance,
17 the bid guaranty will be returned to the bidder. No
18 compensation will be paid to the bidder as a result of this
19 cancellation.